

Before the
Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 92-61
)	
LRB BROADCASTING)	File No. BPH-901218MI
)	
DAVID WOLFE)	File No. BPH-901219MI
)	
ZENITRAM COMMUNICATIONS, INC.)	File No. BPH-901220MG
)	
For Construction Permit for)	
a New FM Station on Channel)	
288A in Brockport, New York)	

TO: Honorable Richard L. Sippel
Administrative Law Judge

REPLY TO OPPOSITION
TO
JOINT MOTION TO DISMISS FOR FAILURE TO PROSECUTE

LRB Broadcasting ("LRB") and David Wolfe ("Wolfe"), by their respective attorneys, hereby submit their reply to the "Opposition to Motion to Dismiss" filed by Zenitram Communications, Inc. ("Zenitram") on June 1, 1992. In support whereof, the following is shown:

On May 18, 1992, LRB and Wolfe filed a "Joint Motion to Dismiss for Failure to Prosecute". In their Motion, the Movants argued that Zenitram's application should be dismissed for failure to furnish the document production materials as required by the Standard Document Production Order. The date prescribed in the Hearing Designation Order for serving the materials required under the Standard Document Production Order was May 11, 1992. LRB and Wolfe served their document production materials on that date. However, Zenitram failed to furnish the other parties with any document production materials on May 11 and failed to

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seek additional time for such production. Eventually, both LRB and Wolfe received Zenitram's document production materials on June 2, 1992; twenty-two days late. Zenitram offered no excuse or explanation for the delay.

On May 22, 1992, LRB and Wolfe filed a "Supplement to the Joint Motion to Dismiss for Failure to Prosecute". The Supplement detailed the fact that Zenitram had also filed a Notice of Appearance with the Commission on May 18, 1992; two weeks after the May 4, 1992 deadline date.

In its Opposition, Zenitram does not address its failure to adhere to the document production requirements. Rather, Zenitram attempts to put "spin control" on the fact that it filed a Notice of Appearance fourteen days late. First, Zenitram blames the delay on the courier service. However, to date, Zenitram has not submitted an Affidavit from the courier company or the individual courier to support its assertion that the courier did not timely deliver the Notice.¹ Secondly, Zenitram argues that the Presiding Judge should not necessarily focus on the late-filed Notice of Appearance. Instead, Zenitram asserts that the "key point" is that it paid its \$6,760.00 hearing fee in a timely fashion. But Zenitram cites no precedent where the

¹ In Juan Galiano, 5 FCC Rcd 6442 (1990), recon. denied, 6 FCC Rcd 895 (1991), the Commission dismissed an FM application because the applicant failed to demonstrate good cause for the late filing of the notice of appearance and hearing fee. The Commission rejected the applicant's self-serving and unsupported allegations.

Commission has excused an applicant for a late-filed Notice of Appearance because it had filed a timely hearing fee.

Zenitram also argues that its application should not be dismissed because it is in the best interest of the public for there to be competition in selecting broadcast permittees. However, contrary to Zenitram's argument, the public interest will be served because there will be a choice between two applicants for the Brockport FM station should Zenitram's application be dismissed. An applicant's ability to meet procedural deadlines set out in a Hearing Designation Order and/or a Prehearing Conference Order is a reflection of how that applicant will serve the community of license should it be awarded the construction permit. Zenitram has consistently failed to comply with the procedural and discovery deadlines. Furthermore, its explanations are either unsupported or non-existent. Zenitram's blatant disregard of these requirements cannot be excused.

WHEREFORE, in light of the foregoing, LRB and Wolfe respectfully request that the Presiding Judge dismiss the application of Zenitram for failure to prosecute.

Respectfully submitted,

LRB BROADCASTING

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June 10, 1992

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 10th day of June, 1992, copies of the foregoing were mailed, first class, postage paid to the following:

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